In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES OF AMERICA, appellant
v.
HOLT STATE BANK, DEPOSIT BANK OF Winona, Federal Land Bank of St. Paul, et al. } No 337

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

STATEMENT

This is a suit by the United States to quiet title to what was formerly the bed of so-called Mud Lake in the State of Minnesota. The area in question was formerly a part of the Red Lake Chippewa Indian Reservation and was ceded with other lands, pursuant to the provisions of the act of January 14, 1889, 25 Stat. 642, commonly known as the Nelson Act. That act provided that the ceded agricultural lands should be disposed of to actual set-

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tlers only under the provisions of the homestead laws, each settler being required to pay for the land entered by him the sum of $1.25 for each and every acre, which money, after the deduction of certain expenses, was to be deposited in the Treasury of the United States to the credit of the Chippewa Indians of Minnesota as a permanent fund. (R. 3.)

The area involved is situated in townships 156 North, Ranges 41 and 42 West of the 5th Principal Meridian, and when those townships were first surveyed in 1892 this area was meandered and designated as Mud Lake on the official plats returned by the surveyor. (Exhibits A and B to the Bill of Complaint.) The lands abutting on the so-called lake were disposed of according to the provisions of the act of 1889, *supra*. In some of the patents that were based on these entries it was expressly stated that the grant was limited to an area above the meander line (R. 242, 256, 269, 292), while in other patents there was no such restriction or limitation.

By the act of June 21, 1906, 34 Stat. 325, 352, Congress authorized the Secretary of the Interior to cause to be made a drainage survey of the land ceded by the Chippewa Indians under the Nelson Act, which at that time remained unsold and were wet, overflowed, or swampy in character, with a view to determining what portions thereof might be profitably and economically reclaimed by drainage, the number, location, cost, and extent of drainage ditches, canals, or improved natural water

courses required to afford drainage outlets, and whether a sufficient fund for such improvement could be provided by an increase in the price at which such unsold ceded lands should be sold in the future. The act made an appropriation of $15,000 for the purpose of paying the expenses of this survey and provided that the amount appropriated should be reimbursed from the funds in the Treasury belonging to the Indians. It seems that $20,000 additional was subsequently appropriated to the same end. 34 Stat. 1033; 35 Stat. 82.

Pursuant to this legislation two drainage surveys were made, one in 1906 (House Doc. 607, 59th Cong. 2nd sess.) and the other in 1907 and 1908 (House Doc. 27, 61st Cong. 1st sess.).

By the act of May 20, 1908, 35 Stat. 169, Congress made all lands in the State of Minnesota which where subject to entry and all entered lands for which no final certificates had issued subject to the provisions of the laws of the State of Minnesota relating to the drainage of swamp or overflowed lands for agricultural purposes to the same extent and in the same manner that lands of like character held in private ownership were subject. This act provided that the cost of the drainage work should be equitably proportioned among all such lands, private lands, unentered lands, and lands entered but not patented.

Following this legislation a drainage ditch was constructed through the area in question as a result of which Mud Lake was drained in the year

1910 or 1911 (R. 5, 98, 418); and in 1913 the Government surveyed the lake bottom finding it to contain 4929.64 acres, and it was opened to entry and was in fact entered by homesteaders pursuant to the act of 1889 (R. 6), many of the entrymen being ex-service men of the World War.

In the year 1913 what appears to have been a friendly suit was instituted in the State District Court by one of the owners of lands abutting on the lake against the others for the purpose of adjudicating their titles, and by the judgment rendered in that case it was declared that the owners of the abutting lands were the owners of that portion of Mud Lake contiguous thereto and extending to the center thereof. The United States was named as a party defendant in that suit, but there is nothing to show on whom service was made in that behalf.

As already stated, this suit was brought by the United States to quiet title as against the owners of the shore lands abutting on the lake, who are the homestead entrymen first above named, or their assignees.

At the trial of the case inquiry was directed as to whether the lake was, before it was drained, a navigable body of water, and on this question the testimony of a number of witnesses was taken. It appears from the evidence that the lake at its deepest places was about four and a half feet deep when full of water (R. 310, 311); but that when the lake was full of water the entire surrounding country was wet and overflowed (R. 327). In one year,

1900, the lake was almost dry and hay was cut from the bottom (R. 315, 371). One witness testified that "You couldn't by any means use a boat" that year (R. 376). The lake was a great hunting ground in the fall of the year (R. 336, 342), and hunters used boats for that purpose. From 1902 to 1907 there were times when it was too dry to use a boat (R. 316). In the wintertime the waters of the lake froze apparently to the bottom (R. 322, 388). There were one or two stores in the vicinity of the lake the goods for which were usually brought up on sleighs in the winter, though it seems that sometimes in the summer the rivers and Mud Lake were used for that purpose.

One witness for the Government, who lived for years within two miles of the lake, testified that he could not always use a boat to cross it. He used a boat when he could do so and when he got stuck he used a pole or went out and pulled it. There were times when he would have to get out of the boat and push it. That happened many times (R. 357). The testimony of another witness was to the same effect (R. 371). One year he drove across the lake with a team.

A witness for the defendants testified that he had goods and merchandise brought up by row-boats and also by a gasoline launch. Sometimes he had two or three boats out at one time. He couldn't recollect how many but he kept a number of boats every season (R. 400). On cross-examination he said they made about five trips in boats

and he admitted that the year he ran a gasoline launch was quite a wet year (R. 401). As a rule the boats which the witnesses used in crossing Mud Lake were rowboats. It was an exception to use a gasoline launch on Mud Lake (R. 402).

Another witness for the defense testified that he was not at the lake very often. There was nothing to take one to the lake unless he went there for hunting. (R. 408.) This witness would not fix any number of times that he crossed the lake in a rowboat. He wouldn't say that he had been across there twelve times. (R. 409.)

The lake seems to have had a well-defined shore on the west, north, and south sides, but on the other side there was no shore. One witness for the defendants testified that he had trouble in crossing the lake in 1906:

> Q. You had difficulty in getting the boat across, did you?
>
> A. You could hardly get across with the boat.
>
> Q. It was so shallow?
>
> A. Yes.
>
> Q. It would be impossible to row across?
>
> A. You couldn't.
>
> Q. You couldn't go across?
>
> A. No. (R. 439.)

Briefly summarized the testimony shows that the lake seldom served any human purpose beyond floating the canoes of hunters. It may or may not have possessed a sufficient uniformity of depth to

permit its navigation by boats used in the prosecution of more serious pursuits; but it is apparent that there was little occasion to test its possibility as a useful avenue of commerce.

The District Court by decree entered March 3, 1922, held that Mud Lake, before it was drained, was a navigable lake; that the respective owners of the subdivisions of land abutting thereon were the owners of the land which was formerly the bed of the lake in front of said subdivisions and extending to the center of the lake; and the court accordingly dismissed the Government's bill of complaint. (R. 297.)

An appeal was taken to the Circuit Court of Appeals, where the action of the lower court was affirmed in an opinion which held that whether the lake were navigable or not, the entrymen of the surveyed land adjoining the lake acquired by their entries title to the center of the body of water. But the Court of Appeals as a matter of fact likewise held the lake to be a navigable body of water. (R. 451.)

ASSIGNMENT OF ERRORS

1. The Circuit Court of Appeals erred in holding that prior to its being drained in 1910 or 1911, Mud Lake was a navigable body of water.

2. The Court erred in not holding that the United States was the owner of the bed of the lake in trust for the Indians and was under obligations to sell it for their benefit.

3. The Court erred in not giving effect to the limitations in some of the patents providing that the purchasers were restricted to the meander line.

ARGUMENT

I

Mud Lake was never a navigable body of water in fact, therefore the title to the bed of the lake did not vest in the State of Minnesota

Those waters must be regarded as navigable waters which are navigable in fact.

> And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. *The Daniel Ball,* 10 Wall. 557, 563.

In *The Montello,* 20 Wall. 430, 442, this Court said:

> It is not, however, as Chief Justice Shaw said, " every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful for some purpose of trade or agriculture."

Considering this question this court said in the case of *Leovy* v. *United States,* 177 U. S. 621, 632, referring to the rule laid down in *The Daniel Ball* and *The Montello, supra:*

> It is a safe inference from these and other cases to the same effect which might be cited that the term "Navigable waters of the United States" has reference to commerce of a substantial and permanent character to be conducted thereon.

In *Harrison* v. *Fite*, 148 Fed. 781, the Circuit Court of Appeals for the Eighth Circuit used the following language (p. 783):

> To meet the test of navigability as understood in the American law a water course should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary, precarious, and unprofitable, is not sufficient. * * * Mere depth of water, without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes.

No inference of navigability can arise from the action of the Government in meandering the so-called lake. The same thing has been done on numerous water courses admittedly nonnavigable.

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Besides the surveying officers were not clothed with power to settle the question of navigability. *Oklahoma* v. *Texas,* 258 U. S. 574, 585.

> The question whether waters are or are not navigable is in the first instance a Federal question, the authoritative and final answer to which can only be given by the Supreme Court of the United States interpreting and applying the Federal Constitution. 29 Op. A. G. 455, 466.

As said by the Supreme Court in *Oklahoma* v. *Texas, supra* (p. 586), the settled rule in this country is—

> that navigability in fact is the test of navigability in law, and that whether a river is navigable in fact is to be determined by inquiring whether it is used, or is susceptible of being used, in its natural and ordinary condition as a highway for commerce.

In that case the court held that the Red River in Oklahoma was nonnavigable, notwithstanding the fact that it was shown that at certain seasons of the year boats of light draft carried merchandise up the river and took back cotton and other products on their return trip. So in *Brewer-Elliott Oil and Gas Company* v. *United States,* 260 U. S. 77, it was held that the Arkansas River was nonnavigable above Fort Gibson, notwithstanding that skiffs could be used on the river and there were times when much larger craft could be used.

Tested by the rules laid down in the cases cited, it will be readily seen that Mud Lake falls far short

of being a navigable body of water. It may have had sufficient depth at times of floods for the use of boats of light draft, but there were seasons when the lake was practically dry land, and often in times of water the boats that were used upon the lake had to be poled or pulled across the shallow places. Moreover, there was no commerce to be conducted on the lake, as the country was sparsely settled and there was little or no occasion for it. The situation in this regard is shown by a memorandum accompanying the report to Congress on the drainage survey, where it is stated:

> In the area surveyed many thousands of acres of land have been patented, and occasionally it has been possible to raise a crop. But for much of every year the land is so soaked in water as to be unfit for cultivation.
>
> At certain seasons the people are entirely isolated on account of the impassability of the country surrounding them, and they may have been reduced to dire poverty by their inability to secure outlets for such ditches as they have been able to dig. House Doc. 607, p. 3, *supra.*

It is apparent, therefore, that the title to the bed of Mud Lake at no time vested in the State of Minnesota, and the Circuit Court of Appeals was clearly in error in holding the lake to be navigable. The court fell into this error in adopting the decision of the Supreme Court of the State as affording a proper definition of navigable waters. This view is not only at variance with the views generally

adopted by the courts of the several States (see *Harrison* v. *Fite, supra,* but obviously extends beyond the limit of the rule as laid down by this court in the decisions above cited. To admit a multiplicity of rules defining navigability would be to violate the principle of equality among the States under pretense of observing it, and to permit the various States to define the rule for themselves would be in effect to make them the arbiters of their respective prerogatives under the Constitution and submit the property rights of the United States to State determination. 29 Op. A. G., 455. The State has asserted no claim to the lake bottom under the swamp land law, nor could it have done so with any hope of success in view of the decision of this court in *State of Minnesota* v. *Hitchcock,* 185 U. S. 373.

II

The Government clearly had the right to limit its patents to lands above the meander line

When the United States owns the bed of a nonnavigable body of water and the lands on all sides of it, it is free in disposing of uplands to retain all or any part of the land covered by the water, and whether in any particular instance it has done so is essentially a question of what is intended. *Oklahoma* v. *Texas, supra.* It is clear in the instant case from the Act of 1889 that Congress intended all of the lands ceded by the Indians to be sold for their benefit, and the parties entering

the lands were required to pay a fixed price for each and every acre purchased by them. Such being the case, and Mud Lake not being a navigable body of water, it should never have been meandered. That it was entirely feasible to extend the lines of the public survey across the so-called lake is apparent from the fact that when the drainage survey was made in 1910, lines were run across the lake. Indeed, if the survey had been made in the year 1900 or 1906, there would have been no difficulty in surveying the lake bottom because it was comparatively dry land. The apparent ease with which the so-called lake was drained shows that at most it was but a deep place in the swamp. The fact that it was practically dry during some years before it was drained shows that it was not even a permanent body of water.

Soon after the drainage was effected, the Secretary of the Interior submitted to the Attorney General for his opinion the question whether the lake bottom should be surveyed and disposed of for the benefit of the Indians. Whereupon the Attorney General in a well-considered opinion advised the Secretary that the lands should be surveyed and disposed of as other lands included in the cession that had been reclaimed, pursuant to the Act of May 20, 1908, and the drainage laws of the State. 29 Op. A. G., 455, *supra*. In the course of that opinion it was stated (p. 468):

> That the Government rests under an obligation to deal with the reclaimed area in

> such wise as to realize for the Indians at least the stipulated price per acre—a conclusion which acquires added strength from the action of Congress in appropriating the Indians' money to carry out the original drainage survey.

In that opinion the Secretary was further advised that any patents that might issue for the shore lands should by appropriate description be confined to the land above the meander line.

The opinion was accepted by the Land Department, the land was surveyed and in most of the patents thereafter issued for the adjoining lots there was a statement to the effect that the patent was limited to the area above the meander line.

In *Mitchell* v. *Smale,* 140 U. S. 406, it is plainly indicated that this might properly be done except for the swamp land grant to the States. In that case the court said (p. 413):

> Nor do we mean to say that, in granting lands bordering on a non-navigable lake or stream, the authorities might not formerly, by express words, have limited the granted premises to the water's edge, and reserved the right to survey and grant out the lake or river bottom to other parties. But since the grant to the respective States of all swamp and overflowed lands therein, this can not be done.

But as we have shown the swamp land grant to Minnesota does not apply to lands that were in the Indian reservation at the time the grant was made,

and there was, therefore, no reason why the Land Department should not issue patents limiting the area conveyed to lands above the meander line. That was actually done in some cases and it should have been done in all instances. If the patentees of these shore lands are permitted to extend their holdings to the center of the drained area, they will be given many more acres than they entered and paid for. For example, one who entered 14.40 acres on the shore will receive 174 acres of the drained area. Another, who entered 35.50 acres, will receive of drained area 295 acres, and another, who entered only 3.75 acres, will receive over 87 acres, or more than 26 times as much as the area entered and paid for. This would obviously work an injury to the Indians who are entitled to be paid for every acre of land which they ceded. Those who entered the shore lots abutting on the so-called land have no real cause to complain if their patents are limited to the surveyed lots because they received title to all the land they paid for and are not thereby denied the access to the water for the reason that there is no longer any water in the lake.

Some point may be made of the fact that all of the patents were not limited to land above the meander line, but we submit that a practical as well as a legal view must be taken of the situation. It would be practically impossible to allow some riparian owners to extend their holdings to the center of the lake and at the same time give any recognition to the extension of the public-land

surveys across the area, because the latter was according to the rectangular system, while the holdings of the riparian owners are fan-shaped, running to a point in the center of the lake. The fact that some of the patents were expressly limited to the area above the meander line should be taken to mean that all must be so limited. There is but one other way of reconciling the situation, and that is to ignore the limitations that were inserted in some of the patents and accord riparian rights to all the patentees—something that can not be done without violence to the facts.

In some respects this case is very much like that of *Chapman & Dewey Lumber Co.* v. *St. Francis Levee District,* 232 U. S. 186. In that case a body of water had been meandered and the abutting lands had been patented to the State of Arkansas under the swamp-land grant. It was contended that the meandered area had passed to the State by reason of the latter's selection of the "whole of the township." The case came to this court, upon a writ of error, from the Supreme Court of the State, the latter having held, in accordance with the contention above noted, that the State acquired title to the land by reason of having selected the whole of the township. Both of the Sate courts had found that at the time of the survey the meandered area was not a lake or permanent body of water, but only temporarily overflowed, and was not distinctly lower or materially different from the adjoining lands, and hence that

the lake was not properly meandered. Under this finding this court held that the meandered area did not pass by the patent conveying the whole of the township or by riparian right with the adjoining fractional subdivisions, and that title therefore remained in the United States.

So here we contend that Mud Lake should never have been meandered. On one side, at least, it had no containing bank, and at times it was practically dry. It was not materially different from the other low places in the swamp and it was entirely possible to extend the lines of survey across it, and that is what should have been done. In other words, at the time of the first survey in 1892 the so-called lake was merely swamp or overflowed land, title to which did not pass by riparian right with the patents for the abutting lots, but remained in the United States to be disposed of for the benefit of the Indians whose money had been used to make the drainage survey.

III

The United States owned the lake bed in trust for the Indians and was under obligations to them to dispose of it for their benefit

The Red Lake Indian Reservation has always been Indian country. The Indians have been under the control of an agent since 1849. The Interior Department for years prior to the admission of Minnesota as a State recognized the reservation and treated the Indians as reservation Indians.

The State of Minnesota, 22 L. D. 388; *Minnesota* v. *Hitchcock,* 185 U. S. 373, *supra:*

The Indians' title was not extinguished until the Indians had ratified the act of January 14, 1889, and then their title was relinquished to the United States only in order that the lands might be sold for their benefit. This Indian title included the ownership of the lakes as well as lands not covered by water. Indeed, the lakes were often of more value for the hunting and fishing which they afforded than were the dry lands.

Even upon the assumption that the lake was navigable, which, under the evidence, we must deny, still the State of Minnesota never acquired title to the lake because it was reserved for the Indians. As said by this court in *Shively* v. *Bowlby,* 152 U. S. 1, 48:

> We can not doubt, therefore, that Congress has the power to make grants of lands below high-water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory.

There can be no doubt that the reservation of these lands for Indian purposes was a public purpose appropriate to the object for which the United

States held the territory, *United States* v. *Winans*, 198 U. S. 371.

We submit that this is a case where the general rule laid down in *Hardin* v. *Jordan* and *Mitchell* v. *Smale*, 140 U. S. 371, 406, should not be followed, because in the act of 1889, under which the lands were ceded by the Indians, there was a plainly declared intention that the latter should be paid for every acre of land that they ceded. The mere fact that this particular area was covered by water at the time is of no moment, because there were thousands of other acres so covered. Mud Lake was a place but a little deeper than usual in the swamp. Its drainage was readily effected by the construction of the drainage ditch, and there is no reason in logic or in law why the Indians should not be paid for it. Their money was used to make the drainage survey and it was plainly the intent of Congress that the lands drained were to be sold for their benefit.

IV

The United States was not bound by the proceedings had in the State court

The United States was named as a party defendant to the suit in the state court, where it was adjudged that the owners of the fractional lots abutting on the lake were entitled to extend their holdings to the center. We hardly think it necessary to say that this was, of course, ineffective for any purpose. It is not shown upon whom service was

made, nor could any one accept service on behalf of the United States in the absence of authority from Congress, and it is not even suggested that this authority was given. *Stanley* v. *Schwalby*, 162 U. S. 255, 270. The Unied States was, therefore, in no way bound by the judgment of the state court.

CONCLUSION

It is respectfully submitted that the decisions of the lower courts should be reversed.

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